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2016 NOV 15 7:11:25 PM 1: 52

November 15, 2016

VIA HAND DELIVERY

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Jeff S. Jordan, Esq.
Assistant General Counsel
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Federal Election Commission
999 E Street N.W.
Washington, D.C. 20463

Re: MUR 7136

Dear Mr. Jordan:

On behalf of Strickland for Senate and Michael J. Johrendt in his official capacity as Treasurer, we submit this letter in response to the complaint filed by the Foundation for Accountability and Civic Trust (the "Complaint") on September 28, 2016, alleging a violation of the Federal Election Campaign Act (the "Act") or Federal Election Commission ("FEC" or "Commission") regulations.

The Complaint falsely alleges that Treasurer Michael J. Johrendt and Strickland for Senate (the "Campaign") engaged in prohibited coordination with Senate Majority PAC ("SMP"), American Federation of Teachers ("AFT"), and the American Federation of State, County and Municipal Employees ("AFSCME") in connection with advertisements opposing Ohio Senate candidate Rob Portman. The only factual basis for the Complaint's allegations is the alleged similarity in theme between the advertisements at issue and earlier communications made by the Campaign on publicly available websites. However, the Commission has made clear on several occasions that such activity does not provide a basis to find that a communication is "coordinated." Because the Complaint does not allege any other facts showing that coordination took place, and because no coordination did take place, the Commission should dismiss the Complaint immediately for failing to provide "sufficient specific facts, which, if proven true, would constitute a violation of the [Act]."¹

FACTUAL BACKGROUND

The Complaint falsely claims that the Campaign "made a web page simply to communicate with a super PAC and request certain ads be run." Compl. at 5. This claim is false, and the Complaint lacks any facts to support it. The Campaign does maintain an official campaign website, which is open to the public and includes information related to Ted Strickland and the Campaign.² For

¹ Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith and Scott E. Thomas, Matter Under Review 4960 (Clinton for U.S. Exploratory Committee) (Dec. 21, 2000).

² Ted Strickland for Senate, *available at* www.tedstrickland.com (last accessed Nov. 7, 2016).

example, the website includes a biography of the candidate, a summary of his positions on various issues, and information on how to volunteer for the Campaign. The website also includes a section called "OH Needs to Know," which is updated semi-regularly with posts comparing Ted Strickland to his opponent, Rob Portman, on certain policy issues like Social Security or trade.³ The "OH Needs to Know" section, along with the entire Campaign website, is available to the public.

SMP Ads

The Complaint claims that, "in response" to an update to the "OH Needs to Know" section of the Campaign website in June, SMP "ran ads on the issues." Compl. at 3. On June 28, 2016, the Campaign posted a message in the "OH Needs to Know" section of the website ("June Campaign Message"). The post, like the entire website, is available to the public, and read in relevant part:

Ted Strickland is standing up for working people. Portman is the ultimate Washington insider who is pushing the agenda of the wealthy and well-connected at Ohio's expense.

Once Ohioans understand the contrast between Portman and Strickland on retirement security, Ohioans across the state need to know about the contrast between Portman and Strickland on tax policy. [Portman] supported a budget that cut taxes for millionaires but raised them on the middle class. Strickland... believes millionaires and billionaires should pay more so we can provide tax relief for middle-class families and small businesses.⁴

According to the Complaint, SMP began airing a television advertisement in Ohio on July 7, 2016, criticizing Rob Portman for his close ties to Wall Street ("SMP Wall Street Ad"). Compl. at 3, FN 18. The advertisement read as follows:

Here we are on Wall Street and somebody up there is probably writing Rob Portman a check. Wall Street's given Portman millions in campaign contributions and he pushed a plan to privatize social security and risk your retirement in the stock market. Wall Street gets hundreds of billions in fees even if the market crashes. Maybe Rob Portman should be running as senator of Wall Street, not Ohio.⁵

The Complaint goes on to allege that, after the Campaign posted a message in the "OH Needs to Know" section of the website on July 12, 2016, SMP "responded and posted an ad." Compl. at 4.

³ Ted Strickland for Senate, *Ohio Needs to Know*, available at <http://www.tedstrickland.com/ohio-needs-to-know> (last accessed Nov. 7, 2016).

⁴ *Id.*

⁵ See "Wall Street," YouTube, available at <https://www.youtube.com/watch?v=YMssaB3@2es>.

The Campaign did post a message on July 12 ("July Campaign Message"), which is available to the public, and read, in relevant part:

Ohioans across the state will always need to know about the contrast between Ted Strickland and Senator Portman on trade policy. Portman is the best senator China's ever had – he voted for job killing trade deals like NAFTA, permanent most favored trading status for China and every other unfair trade deal that cost Ohio over 300,000 jobs.

But Ted Strickland voted against NAFTA, against permanent most favored trading status for China and against other unfair trade deals in order to protect Ohio jobs. The Columbus Dispatch wrote that on trade, "the voting records of Strickland and Portman are polar opposites" and that Portman "never met a free trade agreement he didn't like;" the Enquirer wrote that Portman is a "free trade enthusiast;" and Portman has even been called a "dedicated outsourcer."⁶

According to the Complaint, SMP began airing a television ad in Ohio on July 19, 2016, criticizing Rob Portman's voting record on trade, specifically his position on China ("SMP Trade Ad"). Compl. at 4, FN 20. The advertisement read as follows:

This is the Chinese Embassy in Washington. Wonder what they're up to in there. Probably giving Rob Portman an award for being China's best senator. After all Portman voted for eight different trade deals. Portman even led the fight to give the Chinese permanent special trading status. Sure hope Rob Portman is not in there negotiating another trade deal. Hard to believe this guy is running for reelection in Ohio.⁷

The Complaint does not marshal any evidence that the Campaign coordinated with SMP on producing these advertisements. First, the SMP Wall Street Ad has nothing in common with the June Campaign Message. The June Campaign Message described Rob Portman as a "Washington insider" who favors the wealthy over middle class Ohio voters. The SMP Wall Street Ad criticizes Portman for receiving millions in campaign contributions from Wall Street and potentially risking Ohioans retirement in the stock market. The July Campaign Message doesn't even discuss the same topics as the Wall Street Ad, outside of a cursory reference to "retirement security."⁸

Second, there are some similarities between the SMP Trade Ad and the July Campaign Message. They both criticize Rob Portman's position on trade, specifically his relationship to China and the position he has taken with respect to China's trade status. As the Complaint points out, the

⁶ See Ted Strickland for Senate, *Ohio Needs to Know*, available at <http://www.tedstrickland.com/ohio-needs-to-know> (last accessed Nov. 7, 2016).

⁷ See "Embassy," YouTube, available at <https://www.youtube.com/watch?v=iOSw6AuZtWQ>.

⁸ *Ohio Needs to Know*, *supra* note 6.

July Campaign Message says "Portman is the best senator China's ever had,"⁹ and the SMP Trade Ad calls Portman "China's best senator."¹⁰ However, characterizing an opponent as a representative of China's interests over their own constituents is hardly novel this election cycle. For example, Erin McClelland, a candidate for Pennsylvania's 12th Congressional District, called Senator Pat Toomey "China's Senator," based on his voting record on trade.¹¹ Representative Patrick Murphy, current candidate for U.S. Senate, was similarly criticized by Senate Leadership PAC, which asked if "Murphy [was] running to be Florida's senator or China's senator?"¹²

Moreover, there are significant differences between the July Campaign Message and the SMP Trade Ad. The July Campaign Message focused on the effect Portman's trade record would have on Ohio voters: "he voted for job killing trade deals like NAFTA....that cost Ohio over 300,000 jobs." The July Campaign Message also quoted Ohio newspapers, like the Columbus Dispatch, which previously printed that Portman had "never met a free trade agreement he didn't like."¹³ On the other hand, the SMP Trade Ad uses Portman's trade record to suggest, seemingly in jest, that during the 30 second ad, Portman is negotiating a new deal with China in the Chinese Embassy.¹⁴

Other than the partial similarities between the July Campaign Message and the SMP Trade Ad, the Complaint does not marshal any evidence that the Campaign coordinated with SMP, nor does the Complaint offer any evidence of coordination with the other ads mentioned. In fact, no coordination occurred. The Campaign did not request or suggest that SMP create the SMP Wall Street Ad or the SMP Trade Ad; the Campaign did not have any involvement, let alone "material involvement," in the production or dissemination of these advertisements; and the Campaign did not discuss with SMP their plans, projects, activities, or needs.¹⁵

AFT and AFSCME Ads

The Complaint alleges that after the Campaign website was updated in May, both AFT and AFSCME "began running ads as instructed" on May 24, 2016. Compl. at 3. However, the Complaint fails to provide a transcript of the ads in question, or any description of their content. Instead, the Complaint simply claims the ads relate to "retirement security." Compl. at 3. No other facts are provided in the Complaint regarding these two ads. Because the Complaint does not include a transcript of the AFSCME or AFT ads, there is no way to ascertain their subject

⁹ *Id.*

¹⁰ "Embassy," *supra* note 7.

¹¹ Todd Berkey, *McGinty Supporters Stop in Johnstown, Try to Tie Toomey to Wall Street, China*, The Tribune Democrat (Sept. 21, 2016), available at http://www.tribdem.com/news/mcginty-supporters-stop-in-johnstown-try-to-tie-toomey-to/article_71b45b8c-8075-11e6-af5c-8f135bc14f9d.html.

¹² James Rosen, *About 100,000 in U.S. Now Work for Chinese Firms*, The Macon Telegraph (May 27, 2016), available at <http://www.macon.com/news/politics-government/article80386057.html>.

¹³ *Ohio Needs to Know*, *supra* note 6.

¹⁴ "Embassy," *supra* note 7.

¹⁵ 11 C.F.R. § 109.21(d).

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matter. Nor is any evidence presented that the AFSCME and AFT ads were coordinated within the meaning of the Act and the Commission's regulations. And, in fact, they were not.

LEGAL ANALYSIS

A. The Complaint Does Not Allege Facts Establishing that Advertisements are Coordinated Communications

Under Commission rules, an expenditure for a public communication will be considered a "coordinated communication" if it is (1) paid for by an entity other than the campaign; (2) meets certain content standards regarding the substance of the advertisement; and (3) meets certain conduct standards regarding the coordination between the entity that paid for the advertisement and the campaign or an agent of the campaign.¹⁶ Here, the Complaint does not allege facts showing that the conduct prong of the test was met. Accordingly, the Complaint does not establish that the advertisements at issue were coordinated under the Act.

As a general rule, the conduct standards can be satisfied when the communication is (1) made at the request or suggestion of the candidate or its agent; (2) the candidate, candidate's committee, or its agent are materially involved in certain decisions about the communication; or (3) substantial discussions occur between the person paying for the communication or employees or agents of that person and the candidate, the candidate's committee, or agent.¹⁷

The Complaint alleges that the posting of these various messages onto the Campaign website satisfied the conduct prong. That allegation is wrong as a matter of law. The Commission's regulations are clear that communications appearing on a publicly available website - such as a campaign website - are *never* a basis for satisfying the conduct prong. In 2003, the Commission published its revised coordination rule. In its Explanation and Justification, the Commission clarified that a request or suggestion on a publicly available website could *never* satisfy the coordination test's conduct prong. As the Commission explained, "[t]he 'request or suggestion' conduct standard in paragraph (d)(1) is intended to cover requests or suggestions made to a select audience, but not those offered to the public generally. For example, a request that is posted on a web page that is available to the general public is a request to the general public and *does not trigger the conduct standard in paragraph (d)(1)*, but a request posted through an intranet service or sent via electronic mail directly to a discrete group of recipients constitutes a request to a select audience and thereby satisfies the conduct standard in paragraph (d)(1)."¹⁸

Three years later, the Commission again clarified that the use of publicly available information by a third party did not satisfy the conduct prong; they explained that "under the new safe harbor,

¹⁶ See 11 C.F.R. §§ 109.20(b), 109.21.

¹⁷ *Id.* § 109.21(d).

¹⁸ See Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 422 (Jan. 3, 2003) (emphasis added).

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a communication created with information found, for instance, on a candidate's or political party's website, or learned from a public campaign speech, is not a coordinated communication if that information is subsequently used in connection with a communication."¹⁹

The Complaint claims "the ads were clearly created and distributed at the request of the candidate," but provides no facts to support this allegation. Because the Campaign's message appeared on a publicly available website, the post itself cannot be a basis to find that the conduct prong was satisfied.²⁰ Yet, the Complaint alleges no other facts showing that the conduct prong has been met. As the Commission has found in previous instances, a mere inference of coordination is not enough to establish the conduct prong has been satisfied.²¹

CONCLUSION

The Commission may find "reason to believe" only if a Complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the Act.²² Because the Complaint does not allege any other facts showing that coordination took place, and because no coordination did take place, the Complaint fails to state any facts that, if true, would constitute a violation. As the Commission has done when faced with similarly unsupported claims, we request the Commission promptly find no reason to believe the Campaign committed any violation of the Act and dismiss this matter immediately.

We appreciate the Commission's consideration of this response.

Sincerely,



Marc E. Elias
Jonathan Berkon
Courtney Weisman
Counsel to Strickland for Senate and Michael J. Johrendt

¹⁹ Coordinated Communications, 71 Fed. Reg. 33,190, 33,205 (Jun. 8, 2006).

²⁰ *Id.*; *Ohio Needs to Know*, *supra* note 6.

²¹ Factual and Legal Analysis, Matter Under Review 6059 (Sean Parnell for Congress); *see also* General Counsel Report, Matter Under Review 6405 (Friends of John McCain), at 7; Factual and Legal Analysis, Matter Under Review 5754 (MoveOn.org Voter Fund), at 3-4.

²² *See* 11. C.F.R. § 109.21(a).